Supreme Court, U.S.
FILED
SEP 12 2001
CLERK

No. 01-14

IN THE
Supreme Court of the United States

MUCKLESHOOT INDIAN TRIBE,
Petitioner,

v.

PUYALLUP INDIAN TRIBE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

MAP 8

TABLE OF AUTHORITIES

Page

CASES

Nevada v. United States, 463 U.S. 110 (1983) 4

New Hampshire v. Maine, 121 S. Ct. 1808 (2001) 6

O'Brien v. Miller, 168 U.S. 287 (1897) 2

Washington v. Courville, 676 P.2d 1011 (Wash. Ct. App. 1983) 5

REPLY FOR THE PETITIONER

1. In its petition, the Muckleshoot Indian Tribe demonstrated (1) that the plain meaning of the phrase "Puget Sound" in Finding 76 unambiguously includes a far broader area than Elliott Bay, to which the Ninth Circuit "interpreted" it to be limited (Pet. 17); (2) that the structure, purpose, and full context of Judge Boldt's order as a whole confirms that he meant by this language precisely what he said (Pet. 2-3, 18); (3) that Finding 76 was contested at trial and adjudicated by Judge Boldt in an unreservedly final ruling (Pet. 19-20); (4) that this sub-proceeding involves parties that all participated in, or expressly agreed to be bound by, the earlier phase of the case (Pet. 20-21); (5) that the district court's limited retention of jurisdiction over the case for unrelated purposes has no effect on the *res judicata* analysis (Pet. 21-26); and (6) that the Ninth Circuit's rewriting of Finding 76 implicates a variety of factors that heighten the importance of the finality of judgments and the necessity for review by this Court, such as its adjudication of treaty rights, its apportionment of group rights to natural resources, and its securing of treaty rights to an Indian tribe, with whom the United States has an important relationship. Respondents offer no significant response to any of these points or to the Muckleshoot Tribe's basic argument that the Ninth Circuit flagrantly violated *res judicata* in an area where it is most critical.

2. The Muckleshoot Tribe showed that the Ninth Circuit's construction of "the saltwater of Puget Sound" to include only Elliott Bay was an alteration rather than an application of the unambiguous meaning of Finding 76 (Pet. 15-18). Arguing to the contrary, respondents cite a

nineteenth century contract case for the uneventful proposition that language must be read in its context (Opp. 8 (citing *O'Brien v. Miller*, 168 U.S. 287 (1897)). But respondents ignore the Muckleshoot Tribe's extensive discussion of the context of the phrase "Puget Sound" in Finding 76 showing that, for a variety of different reasons, the phrase clearly was not meant in some novel sense to mean Elliott Bay (Pet. 2-5, 18). Respondents offer no discussion of their own in this regard, and do not offer any textual argument that "Puget Sound" can be reasonably construed to refer only to Elliott Bay.

Instead, respondents go on to acknowledge frankly that the Ninth Circuit based its decision on an independent review of the record evidence underlying Finding 76 (Opp. 8). Respondents assert that the Ninth Circuit "found the evidentiary record firmly establishes that the treaty-time ancestors of the Muckleshoot Tribe were upriver people, and among those least likely to have engaged in regular fishing throughout all the waters of Puget Sound" (Opp. 8).[1] Thus, respondents affirmatively embrace the Muckleshoot Tribe's showing (Pet. 15-17) that the Ninth Circuit's "interpretation" of Finding 76 consisted simply of ascribing to Judge Boldt whatever "meaning" was necessary to make it comport with the Ninth Circuit's own factfinding.[2]

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[1] Respondents are flatly wrong in saying that Elliott Bay is "the portion of Puget Sound nearest [the Muckleshoot Tribe's] reservation" (Opp. 3). The Muckleshoot reservation is substantially closer to the portion of Puget Sound adjacent to Vashon Island (Area 11) than it is to Elliott Bay. *See infra* at 8 (map).

[2] Even if "reviewing the record" (Op. 9) were a proper means of interpreting a court order, the Ninth Circuit's decision would still be plainly erroneous. Respondents nowhere address the Muckleshoot Tribe's

3. The petition also demonstrated that the Ninth Circuit's readjudication of the Muckleshoot Tribe's U&A fishing area violated the doctrine of *res judicata* (Pet. 19-26). Respondents' discussion of *res judicata* (Opp. 9) consists of a single paragraph that addresses none of the elements of the applicable test under that doctrine. Not only does this scant response fail to confront any of the Muckleshoot Tribe's substantive arguments on this point, but it is premised upon the assumption that the Ninth Circuit's decision resolved an ambiguity in Finding 76 (Opp. 9) — a premise that the Ninth Circuit itself expressly disclaimed (Pet. App. 8a). Respondents' failure to address the central issue in the petition underscores the absence of any conceivable justification for the Ninth Circuit's ruling under this Court's precedents.

The Muckleshoot Tribe showed that there is no exception to the requirements of *res judicata* in this case based upon the district court's retention of jurisdiction over the case (Pet. 21-26). This is reinforced by the actual language of the applicable reservation of jurisdiction in the district court's order, which was limited to ascertaining "whether or not the actions . . . [of] any party . . . are in conformity with Final Decision #I or this injunction." 384 F. Supp. at 419 ¶ 25(a) (*see also* Pet. 21-22). Respondents mention "retained jurisdiction" in passing (Opp. 9), but make no effort to address the arguments and authorities set out in the petition. Thus, the Muckleshoot Tribe's showing on this point, too, stands unanswered.

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demonstration that the evidence expressly placed that tribe's treaty-time ancestors far outside Elliott Bay in the Sound, or the fact that several of the rivers on which the Muckleshoot Tribe's treaty-time ancestors lived and traveled entered the Sound far south of Elliott Bay, in Areas 11 and 11A (Pet. 10-12 (identifying the rivers on which the Muckleshoot ancestors lived and discussing evidence that they fished in the Sound as far south as Commencement Bay)).

4. The Muckleshoot Tribe showed that *res judicata* is particularly important in the context of this case for numerous reasons, and that review by this Court is therefore especially important (Pet. 26-29; *see, e.g.*, *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983)). Respondents' conclusory assertion that this case is not sufficiently important to warrant this Court's review (Opp. 6) does nothing to answer this showing. Respondents first note that the petition is not premised upon a circuit split, but then immediately proceed to acknowledge that no such split could possibly arise with respect to this issue because the effect of the Ninth Circuit's decision is "local" to Washington Indian Tribes near the Puget Sound.

Respondents next assert that the case does not merit review because the Ninth Circuit was "not directly interpreting a treaty." But the Muckleshoot Tribe's treaty rights are at the center of this case, and this fact is one reason why the Ninth Circuit's error is of sufficient importance to warrant this Court's review. Respondents fail even to mention, let alone respond to, the other factors identified in the petition demonstrating the unique importance of review in this case. The strong interest in finality with regard to decisions allocating the rights of large groups of people to natural resources and the special, long-standing interest in ensuring fairness in protecting the federal rights of Indian tribes demonstrate the need for this Court's review, and stand entirely unaddressed by respondents. Respondents also do not offer any response to the Muckleshoot Tribe's demonstration (Pet. 29) that the Ninth Circuit's decision threatens the finality of judgments generally, and particularly in cases of retained jurisdiction, by sanctioning the reevaluation of evidence even where the order in issue is unambiguous in all relevant respects.

Respondents attempt to minimize the extent of the Muckleshoot Tribe's reliance upon Finding 76 over the decades it remained unamended by stating (Opp. 3) that the Muckleshoot Tribe opened commercial fisheries in Elliott Bay

and in Area 10, but not in Areas 9 or 11. Respondents thus concede that the Ninth Circuit decision, if allowed to stand, will force the Muckleshoot Tribe to abandon the commercial fisheries it has pursued for a quarter century in Area 10, a large region encompassing the central area of the Puget Sound, *see infra* at 8 (map). The Muckleshoot Tribe has heretofore fished extensively throughout this broad area of the Sound.

In any event, the extent of the Muckleshoot Tribe's reliance upon Finding 76 cannot be measured by the locations of its commercial fisheries alone. Muckleshoot tribal members, exercising the tribe's treaty fishing rights under Finding 76, have routinely fished elsewhere in the Sound, including in Area 11. *Washington v. Courville*, 676 P. 2d 1011 (Wash. Ct. App. 1983), discussed in the petition at page 6, documents one such instance. While respondents assert that *Courville* involved purely individual fishing "in which no tribe participated" (Opp. 3 n.4), they are wrong; the case expressly held that the fishing in that case in Area 11 was protected by the Muckleshoot's *tribal* rights under the Stevens treaties. *See Courville*, 676 P.2d at 1016 (concluding "that Adelaide Beach [in Area 11] was and is a usual and accustomed fishing ground of the Muckleshoot Indian Tribe").

5. Respondents suggest that the Muckleshoot Tribe's participation in other sub-proceedings seeking clarification of other tribes' U&A fishing areas is somehow in conflict with its position here (Opp. 2), and even assert that the Muckleshoot Tribe is judicially estopped from urging *res judicata* (Opp. 9-11). But in the other sub-proceedings cited by respondents, the Muckleshoot Tribe has sought only enforcement of the order as written or interpretation of genuinely ambiguous language. Phrases like the "environs of Seattle" leave a measure of indefiniteness about the precise area encompassed that is susceptible to judicial resolution. No such indefiniteness can be relied upon to support the determination that "Puget Sound" in

Finding 76 in fact means "Elliott Bay." The court below simply rewrote rather than construed the language used.

The Muckleshoot Tribe has never urged the courts below to disregard the unambiguous language of any provision of Judge Boldt's 1974 final order. The Muckleshoot Tribe's positions and arguments in previous cases are thus fully consistent with its present contention that the court below cannot disregard the actual Boldt decision and delve back into the record to decide anew the proper area of a tribal U&A.

Indeed, to the extent that there has been judicial estoppel with regard to the matters here at issue, it is against respondents. At trial, the United States Department of Justice requested a Muckleshoot U&A including "the saltwater of the Puget Sound," and the Puyallup Tribe joined in the United States's proposal (ER 120-22); the other respondent tribes acquiesced in that language as a condition of intervention. Yet respondents now assert that Judge Boldt could not really have meant the very language that they themselves joined in proposing. This is precisely the sort of conflicting legal position that the Court held creates a judicial estoppel in *New Hampshire v. Maine*, 121 S. Ct. 1808, 1814 (2001) (noting that judicial estoppel applies "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position," but later "assume[s] a contrary position").

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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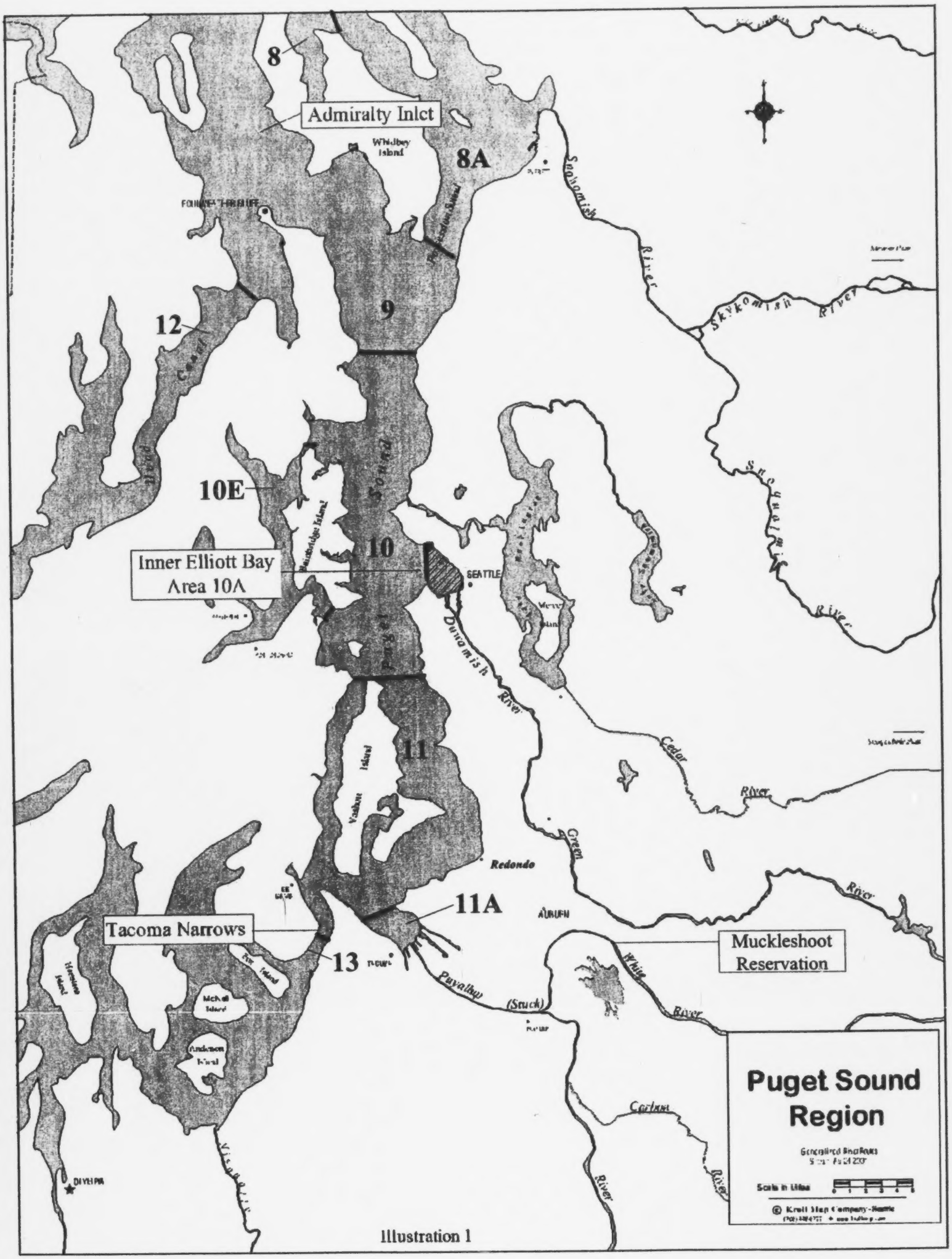

Illustration 1

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